IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-155

Philadelphia Newspapers, Inc., The Associated Press, Central States Publishing, Inc., The Pennsylvania Newspaper Publishers Association. The Pennsylvania Society of Newspaper Editors, and The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, *Appellants*,

v.

The Honorable Domenic D. Jerome, Judge of the Court of Common Pleas of Delaware County, Pennsylvania

and

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association and The Pennsylvania Society of Newspaper Editors, *Appellants*,

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company, *Appellant*,

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association, and The Pennsylvania Society of Newspaper Editors, *Appellants*,

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company, *Appellant*,

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania.

Appeals From the Judgments of the Supreme Court of Pennsylvania.

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of this Court's rules, appellees move that the appeals from the judgments of the Supreme Court of Pennsylvania denying appellants' petitions for mandamus, prohibition and extraordinary relief be dismissed on the ground that they rest on an adequate and independent state ground, or, in the alternative, that the judgments be affirmed.

STATEMENT

Although the consolidated appeals docketed by appellants (all of whom are members of the press) arise out of three separate criminal proceedings to which appellants sought access, the issues in all three cases are the same. In each instance, a criminal defendant had been indicted for murder and was awaiting trial or retrial.[1] All of the cases were notorious and the crimes charged had been the subject of extensive coverage in the news media.[2] In each case, pretrial motions were filed by the respective defendants seeking the suppression of evidence alleged to have been unconstitutionally obtained, and each defendant further moved, pursuant to the Pennsylvania Rules of Criminal Procedure,[3] that the proceedings be held *in camera* and that confidentiality be maintained pending further order of the court. The respective trial judges issued orders providing for closure of the hearings, impoundment of the hearing records and the maintenance of confidentiality by those involved in the proceedings. Appellants subsequently moved to vacate the orders of the trial judges and to open the then-pending suppression hearings to the press. Following denial of their motions, appellants sought extrordinary relief, by way of prohibition and mandamus, in the Supreme Court of Pennsylvania. Their petitions were de-

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1. The defendant in the Delaware County case, W. A. "Tony" Boyle, had been previously tried and the conviction set aside on appeal.

2. The Boyle case charged the former President of the United Mine Workers Union with the murder of his chief rival for union leadership. It is described by appellants as involving a charge of an "execution-style" murder, and the extensive publicity it generated had led to a change of venue. The two Montgomery County cases involved, respectively, the murder of a policeman and the kidnap-murder of a young girl charged to a police officer. All three cases have now been tried.

3. The relevant rules are set forth in the Jurisdictional Statement (J.S.) at pp 3-6.

nied without opinion. An appeal (No. 77-308) was taken to this Court, and the cause was thereupon remanded on the ground that "the record does not disclose whether the Supreme Court of Pennsylvania passed on appellants' federal claims or whether it denied mandamus on an adequate and independent state ground." 434 U.S. 241 (1978).

In its opinion on remand, entered April 28, 1978 (App. 32 *et seq.*),[4] the Supreme Court of Pennsylvania ruled unanimously, *first*, that it had denied appellants' petitions because, as a matter of state law, a party seeking extraordinary writs must establish "a violation of clear rights not remediable by ordinary processes" (App. 41); *secondly*, that the Pennsylvania Rules of Criminal Procedure, as applied in these cases, satisfied federal constitutional standards. The instant appeals followed.

4. "App." references are to the appendix to appellants' Jurisdictional Statement.

ARGUMENT

I.

Appellants' Jurisdictional Statement proceeds immediately to an elaboration of their federal constitutional claims without reference to the Pennsylvania Supreme Court's initial ground of decision—that extraordinary relief was inappropriate in these cases as a matter of state law. Appellants thus presumably believe either (1) that the State Court, on remand, has abandoned its earlier procedural ground of decision or (2) that the enunciation of alternative state and federal grounds is sufficient to confer jurisdiction upon this Court. Neither position is tenable.

A party seeking to invoke this Court's appellate jurisdiction to review the decision of a state court has the burden of showing that the decision below did not rest upon an adequate and independent state ground. Thus, where it appears that the judgment of the state court "*might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment." *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952) (emphasis in original). It is the appellant's burden to "demonstrate" that state grounds cannot "account for the decision below." *Durley v. Mayo*, 351 U.S. 277, 281 (1956).

We find no basis in Justice Roberts' opinion for concluding that the court below has either abandoned or retreated from its reliance on the extraordinary character of the state writs invoked by appellants, which it stated was at the root of its initial denial of relief. On the contrary, his opinion for the court on remand undertakes to explain in detail, with extensive citation of authority, the state law limitations upon the availability of Pennsylvania's extraordinary writs. App. 40-41. Thus, the court notes that mandamus requires not only a "clear legal right in the plaintiff [and] a corresponding duty in the defendant," but also

the "want of any other adequate and appropriate remedy"; that mandamus will not issue to require "performance of a particular discretionary act"; that "presence of an issue of immediate public importance is not alone sufficient to justify extraordinary relief"; and that even a clear showing of aggrievement "does not assure that this Court will exercise its discretion to grant" such relief. *Ibid.* Accordingly, quite apart from the fact that appellants make no attempt to sustain their burden of establishing the lack of an adequate and independent state ground, the opinion below affirmatively indicates the presence of such a ground: that, in Pennsylvania, the extraordinary writs, unlike ordinary remedies, will be granted only in rare circumstances and in the exercise of the court's broad discretion. See, also, in this connection Justice Rehnquist's opinion upon the prior appeal of this case. 434 U.S. at 242.[5]

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5. Appellants make no claim that ordinary appellate remedies were unavailable in challenging the trial court orders of which they complain. As a general rule, appeals in homicide cases in Pennsylvania lie directly in the Supreme Court, while appeals in other criminal cases lie in the Superior Court, Pennsylvania's intermediate appellate court. However, where (as here) the question on appeal is a collateral one that "includes no consideration of the substance of the crime charged . . .," and where the issues would be the same whether the crime were "simple assault or murder in the first degree," appeals relating to homicide cases may lie in the Superior Court. Cf. *Commonwealth ex rel. Marshall v. Gedney*, 456 Pa. 570, 572 (1974) (appeal from extradition order in homicide case lies in Superior rather than Supreme Court). Appellants here might also have challenged Pennsylvania's rules relating to closure of pre-trial suppression proceedings by instituting an original action for declaratory judgment and injunction under the Uniform Declaratory Judgments Act as adopted in Pennsylvania, 12 P.S. §§831-846. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *certiorari denied sub nom., Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976), where the validity of rules similar to those challenged in this case was litigated through a declaratory judgment and injunction proceeding. (*cont'd*)

The fact that the Pennsylvania Supreme Court proceeded further, explaining at length its reasons for believing that its Rules of Criminal Procedure, as here applied, meet the demands of the United States Constitution, cannot alter the result. Before this Court "may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause," *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937).

II.

Even if one assumes, contrary to our suggestion above, that jurisdictional requirements may be deemed satisfied in this case, we submit that there is no occasion for plenary review of the judgments below.

The decisions of this Court make it inescapably plain that the press has no "constitutional right of special access to information not available to the public generally," *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). See, also, *Houchins v. KQED, Inc.*, 98 S.Ct. 2588 (1978); *Pell v. Procunier*, 417 U.S. 817 (1974). This is particularly clear where the reason for temporarily denying access to the public is to protect an accused whose constitutional right to a fair trial is threatened by prejudicial pretrial publicity. Indeed, in such cases the courts have a positive duty to adopt "those remedial measures that will prevent

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Note 5—Continued:

Nor can it be suggested that it serves no "legitimate state interest" (see *Henry v. Mississippi*, 379 U.S. 443, 447 (1965)) for Pennsylvania to confine closely the availability of the extraordinary writs where other remedies are available—a practice which has its counterpart in federal proceedings, *De Beers Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945).

the prejudice at its inception" and "must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences," *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). Since it is ordinarily impermissible to enjoin publication of matter that has already reached the press, the protective measures, such as closure of pretrial proceedings, must be initiated before the prejudicial information enters the public domain. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564 (1976) (opinion of the Court) and 601 (separate opinion of Justice Brennan). These propositions have been more fully discussed in our response to appellants' prior Jurisdictional Statement, which is on file with the Court (No. 77-308), and are elaborated in the opinion below and in the recent opinion of the New York Court of Appeals in *Gannett Co. v. De Pasquale*, 43 N.Y. 2d 370, 372 N.E. 2d 544 (1977), *certiorari granted*, 98 S.Ct. 1875 (1978).

Appellants claim, however, that even if there is no unqualified right of public access to pretrial judicial proceedings, the Pennsylvania Rules are vulnerable because (so they assert) they call for automatic closure on motion of the defendant and impose no requirement of a judicial determination of the character of the threat to a fair trial and the need for the requested remedy. The claim has some plausibility if one confines oneself to the text of Rule 323. The Rule is silent as to the criteria and procedures to be employed upon the filing of a defendant's motion.[6]

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6. Appellants stress the language of Rule 323(f) (J.S.4), which reads as follows:

> The hearing, either before or at trial, shall be held in open court unless defendant, by his counsel, moves that it be held in the presence of only the defendant, counsel for the parties, court officers and necessary witnesses. In any event, the hearing shall be held outside the hearing and presence of the jury. In all cases the court may make such order concerning publicity of the proceedings as it deems appropriate under Rules 326 and 327.

The Rules, however, do not stand unadorned. They have been authoritatively construed by the Supreme Court of Pennsylvania. As construed, Pennsylvania trial judges are bound to exercise discretion and to tailor any protective order they issue to the necessities of the case. Moreover, the facts of these cases, as judicially noticed by the Supreme Court of Pennsylvania and as averred by appellants themselves (App. 36, n. 3), persuaded the court that the Rules, as applied, were properly based and appropriately limited.

So far as the facts are concerned, the court noted that each of the cases involved a notorious murder that had attracted widespread publicity; that each involved a motion to suppress evidence allegedly obtained in violation of constitutional rights; and that publicity identifying the defendant with evidence of the character sought to be suppressed carried a substantial danger of prejudice (App. 36-38, 44-45). It was "on the record as presented" (App. 62) that the court upheld the application of the Rules.

Far from holding that closure and confidentiality would be automatically imposed on pretrial proceedings on motion of the defendant, the court referred to grant or denial of such a motion as a "discretionary act" (App. 40, n. 11). It further described the challenged Rules as "authoriz[ing] a court in an appropriate case, if necessary, to limit or postpone access to pretrial suppression hearing material . . ." (App. 61). Acutely conscious of the need to avoid overbroad orders in situations where there is friction between the right of a defendant to a fair trial and the interest of the public in securing information concerning the operation of the judicial system, the court stated (App. 50-51):

> We believe that any limitation on access should be carefully drawn. First, the right of access to court proceedings should not be limited to any reason less than the compelling state obligation to protect con-

stitutional rights of criminal defendants and the public interest in the fair, orderly, prompt, and final disposition of criminal proceedings. Second, access should not be limited unless the threat posed to the protected interest is serious. Third, rules or orders limiting access should effectively prevent the harms at which they are aimed. Finally, the rules or orders should limit no more than is necessary to accomplish the end sought.[7] [footnotes omitted]

In light of the above, it is apparent that appellants' characterization of Pennsylvania's Rules as "mandating closed pretrial suppression hearings and impounded court records based solely on the request of the defendant and without hearing or any finding of intending [sic] prejudice" (J.S. 13) is far wide of the mark. On the contrary, the Supreme Court of Pennsylvania, in a construction of the Rules binding on this Court, has required the exercise of discretion and has been solicitous in insisting that orders issued in the exercise of that discretion be limited to the necessities of the case. Since this approach is fully in accord with the consistent line of this Court's decisions from *Sheppard v. Maxwell* to the present, the judgments below should be affirmed.

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7. In its "Conclusion" (App. 61-62), the court repeated:

Experience has plainly demonstrated that premature disclosure of pre-trial suppression material creates a heavy and unnecessary burden upon the judicial process and adversely affects these public interests. Rules 323, 326 and 327 authorize a court in an appropriate case, if necessary, to limit or postpone access to pre-trial suppression hearing material so that the case may proceed in an orderly and timely fashion in an atmosphere free from the hazards and prejudice which may be engendered by the premature disclosure of suppression material, the admissibility of which is yet to be judicially determined. It must be concluded here that the public interest in avoiding unfair and delayed trials and retrials outweighed the postponement of petitioners' access.

It is also important to emphasize that, contrary to suggestions contained in the Jurisdictional Statement, the Pennsylvania Rules, as authoritatively construed in the opinion below, do not authorize any *permanent* "mantle of secrecy" (J.S. 20) on pretrial suppression proceedings. Justice Roberts' opinion for the court observes that, since "all three trials have been completed," "the challenged orders may have expired" (App. 57). See also footnote 10 of the opinion below and accompanying text (App. 39), citing, with approval, *United States v. Cianfrani,* 573 F.2d 835 (3d Cir. 1978), holding that "tapes defendant sought to suppress must be made public after defendant has pleaded guilty." At issue here, then, are *temporary* closures, effective only in the relatively brief period just prior to the beginning of the trial, when the danger of prejudice to the defendant is the greatest. If matters of public importance or interest—evidence, for example, of police or prosecutorial misconduct—emerge at suppression hearings that are closed to the press and the public in order to safeguard defendants' rights, they may be fully aired in the press after the need for that protection has expired.

We recognize the possibility that this Court's decision in the pending *Gannett Co.* case may add some refinements to this Court's prior pronouncements. That, however, would hardly necessitate a remand of the instant case. As observed in the opinion below, in all three cases the trials have long since been completed (App. 57). Such further guidance as might be provided by this Court in the *Gannett* litigation could have no effect in these Pennsylvania cases. Since the trials, as well as the pretrial proceedings, have been concluded, there can be no occasion to issue further instructions to the respective trial judges who entered the orders here under review. Thus, insofar as *Gannett* may provide added guidance, its significance for Pennsylvania courts and cases will be prospective only.

CONCLUSION

For the reasons stated in Point I, these appeals should be dismissed. If, contrary to our submission, the Court should find that disposition inappropriate, the judgments below should be affirmed.

Respectfully submitted,

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